



BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In The Matter Of:

GN Docket No. 00-185

Inquiry Concerning High Speed Access To  
The Internet Over Cable And Other  
Facilities

CS Docket No. 02-52

Internet Over Cable Declaratory Ruling

Appropriate Regulatory Treatment For  
Broadband Access To The Internet Over  
Cable Facilities

INITIAL COMMENTS OF THE PUBLIC CABLE TELEVISION AUTHORITY  
("PCTA"); CITY OF BERKELEY, CALIFORNIA ("BERKELEY"); CITY OF  
ESCONDIDO, CALIFORNIA ("ESCONDIDO"); CITY OF GLENDALE, CALIFORNIA  
("GLENDALE"); CITY OF HAWTHORNE, CALIFORNIA ("HAWTHORNE"); CITY  
OF INDIAN WELLS, CALIFORNIA ("INDIAN WELLS"); CITY OF IRVINE,  
CALIFORNIA ("IRVINE"); CITY OF LAGUNA BEACH, CALIFORNIA ("LAGUNA  
BEACH"); CITY OF LA QUINTA, CALIFORNIA ("LA QUINTA"); CITY OF  
MORENO VALLEY, CALIFORNIA ("MORENO VALLEY"); CITY OF SAN  
CLEMENTE, CALIFORNIA ("SAN CLEMENTE"); CITY OF SAN DIEGO,  
CALIFORNIA ("SAN DIEGO"); CITY OF SAN JUAN CAPISTRANO, CALIFORNIA  
(SAN JUAN CAPISTRANO); CITY OF SANTA CRUZ, CALIFORNIA ("CITY OF  
SANTA CRUZ"); AND COUNTY OF SANTA CRUZ, CALIFORNIA ("COUNTY OF  
SANTA CRUZ")

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1 The PCTA, Berkeley, Escondido, Glendale, Hawthorne, Indian Wells, Irvine,  
2 Laguna Beach, La Quinta, Moreno Valley, San Clemente, San Diego, San Juan Capistrano,  
3 City of Santa Cruz, and the County of Santa Cruz (collectively, the "California Franchising  
4 Authorities") hereby submit the following comments in response to the Commission's  
5 above-captioned Declaratory Ruling and Notice of Proposed Rulemaking ("DR/NPR").

6 I. SUMMARY OF ARGUMENTS.

7 A. Cable modem service has thrived pursuant to the existing "structural  
8 dualism" regulatory approach whereby local government has employed regulations in the  
9 area of mandatory deployment, customer service, and public right-of-way usage fees. The  
10 deployment of cable modem service has grown exponentially in the face of active local  
11 regulation. In fact, in many cases local regulation has spurred or accelerated the  
12 deployment of cable modem service or caused that service to be offered to citizens who  
13 would have been disenfranchised in a completely free marketplace environment.

14 B. The Commission possesses limited, if any, jurisdiction to preempt local  
15 government's regulation of the use of public rights-of-way to site facilities which provide  
16 non-cable services. Local government possesses historic authority grounded in state law to  
17 regulate the use of its public rights-of-way for all purposes including the franchising of  
18 various forms of communication services. Any federal preemption must be express in that  
19 the law does not infer preemptive authority over local control of public rights-of-way due  
20 to the constitutional limitations of the Fifth and Tenth Amendments to the United States  
21 Constitution. Federal law does not create local regulatory rights but simply recognizes  
22 their existence. It limits those rights only in certain express situations. Congress  
23 attempted to strike a careful balance between the rights of local government and the federal  
24 government in developing the Communications Act of 1934 and its subsequent  
25 amendments. Congress recognized that local government possessed the inherent authority  
26 to franchise, regulate, and impose reasonable and non-discriminatory fees upon  
27 communication users of public rights-of-way with minimal federal intervention or  
28 interference. Neither Title II nor Title VI of the Communications Act of 1934 grants

1 regulatory authority to local government since this authority would exist in the absence of  
2 that legislative scheme. To the extent that Congress specifically envisioned the retention  
3 of preexisting local rights in relation to public right-of-way regulation, the Commission  
4 cannot undo this carefully balanced "structured dualism" regulatory scheme by utilizing  
5 vague and undefined "ancillary powers". Thus, local government possesses the inherent  
6 and unabridgeable right based upon existing statutory law to require cable operators to  
7 obtain a separate franchise to use and occupy the public rights-of-way to provide non-cable  
8 services. Local government can impose reasonable fees in the nature of rent for use and  
9 occupancy of public rights-of-way to provide non-cable services. Finally, local  
10 government may regulate the provision of non-cable services subject to the express  
11 limitations and conditions imposed by Congress.

12 C. The Commission cannot "forbear" so as to preclude local government from  
13 applying Title II regulatory provisions to the extent that cable modem services are deemed  
14 to be a "telecommunications service" within the Ninth Circuit. Forbearance authority is  
15 limited in application to the Commission's own regulatory enactments and cannot be  
16 utilized to interfere with specific regulatory powers which have been retained by local  
17 government pursuant to express provisions of the Communications Act of 1934.

18 D. The Internet Tax Freedom Act does not prohibit local government from  
19 collecting franchise fees or other fees relating to the use of public rights-of-way from cable  
20 operators providing non-cable services due to the fact that public right-of-way usage fees  
21 are not deemed to be "taxes" for the purposes of that statutory enactment.

## 22 II. IDENTIFICATION OF THE PARTIES.

23 The PCTA constitutes a joint powers authority created pursuant to California law  
24 vested with the responsibility to franchise and regulate cable television within the  
25 jurisdictional limits of the Cities of Fountain Valley, Huntington Beach, Stanton, and  
26 Westminster, all located in Orange County, California.<sup>1</sup> The remaining members of the

27  
28 <sup>1</sup> The PCTA was formed in the 1970's to provide a regional approach to the franchising  
and regulation of cable television in four contiguous Orange County cities. The PCTA is  
governed by a Board of Directors which contains an elected representative of each of its

1 California Franchising Authorities constitute government entities formed pursuant to  
2 California law which possess the authority and responsibility to franchise and regulate  
3 cable television operations within their jurisdictional boundaries.<sup>2</sup> Collectively, the  
4 California Franchising Authorities represent approximately 725,000 cable television video  
5 subscribers and approximately 14,000 cable modem subscribers.<sup>3</sup> The California  
6 Franchising Authorities regulate a diverse group of cable operators including Adelphia  
7 Communications Corporation ("Adelphia"), TWC, AT&T Broadband ("AT&T"), Charter  
8 Communications, Inc. ("Charter"), and Cox.<sup>4</sup> The California Franchising Authorities are  
9 located in Alameda County, Los Angeles County, Orange County, Riverside County, San  
10 Diego County and Santa Cruz County and clearly constitute a representative cross-section  
11 of local government in California.<sup>5</sup>

12 Most of the California Franchising Authorities have undergone cable television  
13 rebuilds within the last several years.<sup>6</sup> Based upon their rebuild experience, each of the

14  
15 member cities. The sole function of the PCTA is to provide regulatory supervision over  
16 cable operations within the jurisdictional boundaries of its member cities. All cable  
17 regulatory responsibility has been delegated by its member cities to the PCTA.

18 <sup>2</sup> Local government is authorized by California statute to franchise and regulate cable  
19 television pursuant to California Government Code Section 53066, *et seq.* Cable television  
20 does not constitute a public utility in California (*Television Transmission, Inc. v. Public*  
21 *Utilities Com.*, 47 Cal.2d 82, 301 P.2d 862 (1956)) and thus the California Public Utilities  
22 Commission ("CPUC") exercises no jurisdiction over cable television except in relation to  
23 certain cable television construction practices which affect other utility infrastructure.

24 <sup>3</sup> The cable modem subscriber count is based upon the last information made available to  
25 the California Franchising Authorities by their respective cable operators. Unfortunately,  
26 as some cable operators in California, such as Cox Communications, Inc. ("Cox") and  
27 AOL Time Warner Cable ("TWC"), ceased reporting and paying cable modem franchise  
28 fees starting in 2000-2001, several of the California Franchising Authorities have not been  
provided current or accurate information regarding cable modem subscriber counts once  
reporting pursuant to franchise fee collection ceased.

29 <sup>4</sup> In addition to granting a cable television franchise to Charter, Glendale has received an  
overbuild application from Altrio Communications, Inc.

30 <sup>5</sup> Cable modem service has been available throughout the bulk of the California  
Franchising Authorities for several years. However, cable modem service has only been  
recently introduced into the Cities of Indian Wells, La Quinta, and Moreno Valley, which  
are located in the somewhat less densely populated areas of Riverside County, California.  
Cable modem service is not available in the City of Santa Cruz and available and only in a  
small portion of the County of Santa Cruz.

31 <sup>6</sup> A major rebuild required by franchise was underway in Moreno Valley. However, it  
has been halted based upon the financial implosion of Adelphia. However, Adelphia has  
launched "enhanced services," such as cable modem service, upon a node-by-node  
activation basis.

1 California Franchising Authorities have personal knowledge regarding the impact of  
2 modern hybrid fiber coaxial ("HFC") rebuild architecture upon public rights of way  
3 ("PROW"). In addition, most of the California Franchising Authorities have received, in  
4 some cases for several years, franchise fees upon cable modem services. Likewise, most  
5 of these jurisdictions have regulated cable modem service, in almost all cases without  
6 objection of the cable operator, pursuant to the same operational standards as other forms  
7 of cable service in terms of customer service, telephone response, and otherwise.<sup>7</sup> Thus,  
8 the experiences set forth herein of the California Franchising Authorities are real and  
9 personal based upon the construction of cable modem ready systems and the provision of  
10 cable modem services within their boundaries.

11 III. INTRODUCTION AND SUMMARY OF ISSUES.

12 In the DR/NPR, the Federal Communications Commission (the "Commission")  
13 seeks comment upon a variety of issues relating to regulatory treatment of cable modem  
14 service as an "interstate information service." The major categories of solicited comments  
15 relate to the following:

16 (1) The scope of the Commission's jurisdiction to regulate non-cable  
17 services including whether there are any constitutional limitations on the exercise of  
18 that jurisdiction;

19 (2) Whether it is necessary or appropriate at this time to require the cable  
20 operators to provide unaffiliated ISPs with the right to access cable modem service  
21 customers directly; and

22 (3) The role of local government in regulating non-cable services.

23 *(In The Matter Of Inquiry Concerning High Speed Access To The Internet Over Cable And*  
24 *Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory*

25  
26 <sup>7</sup> In some of these communities, the cable system was upgraded to HFC architecture  
27 allowing significant broadband deployment without specific franchise requirements or an  
28 excess of specific franchise requirements relating thereto. In most other cases, the rebuild  
which allowed or at least facilitated the provision of cable modem service was done  
pursuant to franchise requirement. In the City of Santa Cruz and the most of County of  
Santa Cruz, AT&T is not currently required to rebuild its plant and hasn't done so.

1 *Treatment For Broadband Access To The Internet Over Cable Facilities*; FCC 02-77; GN  
2 Docket No. 00-185; CS Docket No. 02-52; Declaratory Ruling And Notice Of Proposed  
3 Rule Making, Released March 15, 2002 (the "DR/NPR"), ¶ 72.)

4 The Commission has requested comments upon numerous sub-issues of the three  
5 major issues described above. All of those sub-issues identified by the Commission are  
6 relevant, important, and merit significant comment and analysis. However, the California  
7 Franchising Authorities will focus upon the following areas of concern in their comments  
8 before the Commission today:

9 (1) The scope of the Commission's authority to promulgate regulations  
10 over non-cable services in the absence of explicit statutory authority;

11 (2) Whether the provision of cable modem service in the Ninth Circuit  
12 constitutes a "Telecommunications Service" subject to Title II of the  
13 Communications Act of 1934 or an "interstate information service" subject to Title  
14 I of the Communications Act;

15 (3) Whether the Commission can and should preempt local regulation of  
16 non-cable services;

17 (4) Whether the Commission can and should "forebear" from the  
18 imposition of Title II common carrier regulation upon cable modem service  
19 assuming the cable modem service is properly classified as a Telecommunications  
20 Service in the Ninth Circuit;

21 (5) Whether or not the Commission can and should assert jurisdiction  
22 under the Communications Act of 1934 to preclude local government from  
23 regulating non-cable services and facilities in particular ways;

24 (6) Whether or not the provision of non-cable services imposes additional  
25 burdens on PROW over and above that which would be imposed in the absence of  
26 facilities designed to deliver non-cable services;

27 (7) Whether or not local government should be able to impose reasonable,  
28 competitively neutral, and non-discriminatory fees upon the provision of non-cable

1 services; and

2 (8) Whether or not local government should be able to establish and  
3 enforce customer services requirements applied to non-cable services.

4 IV. LIMITATIONS UPON COMMISSION AUTHORITY TO PREEMPT LOCAL  
5 REGULATION OF THE USE OF PROW TO PROVIDE NON-CABLE  
6 SERVICES.

7 A. Preemption Of Local Authority Over Non-Cable Services, And Those  
8 Facilities Which Provide Non-Cable Services, By The Commission Must Be  
9 Narrowly Focused And Based Upon Concrete, Measurable And Explainable  
10 Evidence.

11 It is axiomatic that a reviewing court may not substitute its judgment for that of the  
12 Commission. (*Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91  
13 S.Ct. 814, 28 L.Ed.2d 136 (1971).) However, judicial review of the Commission decision  
14 must be "searching and careful," *Id.*, and must ensure both that the Commission has ade-  
15 quately considered all relevant factors and that it has demonstrated a "rational connection  
16 between the facts found and the choice made." (*Burlington Truck Lines, Inc., v. United*  
17 *States*, 371 U.S. 156, 168, 83 S.Ct. 239, 246, 9 L.Ed.2d 207 (1962).) Although the  
18 standard of review is deferential, it may not be uncritical. When an administrative agency,  
19 such as the Commission, reverses prior long standing practice (i.e., non-preemption of  
20 local regulation of cable modem service), the agency must provide a reasoned analysis  
21 indicating that prior policies and standards are being deliberately changed and not casually  
22 ignored. (*People of State of California v. FCC*, 39 F.3d 919, 925 (9<sup>th</sup> Cir. 1994); *Motor*  
23 *Vehicle Manufacturers Association v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29,  
24 43-44, 103 S.Ct. 2856, 2867, 77 L.Ed.2d 443 (1983).) If the record reveals that the  
25 Commission "'failed to consider an important aspect of the problem' or has 'offered an  
26 explanation for its decision that runs counter to the evidence before [it],'", the court must  
27 find the Commission in violation of the Administrative Procedures Act ("APA").  
28



1 (*California v. FCC*, 905 F.2d 1217, 1230 (9<sup>th</sup> Cir. 1990)).<sup>8</sup>

2 In reviewing decisions of constitutional dimension, such as the Commission's  
3 intrusion upon state and localities' rights pursuant to the Fifth and Tenth Amendments,  
4 substantial deference pursuant to *Chevron U.S.A. v. Natural Resources Defense Counsel*,  
5 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) is inappropriate since it raises  
6 serious constitutional questions. (*Rust v. Sullivan*, 500 U.S. 173, 190-91, 111 S.Ct. 1759,  
7 114 L.Ed.2d 233 (1991); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. &*  
8 *Constr. Trades Council*, 485 U.S. 568, 576-76, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988);  
9 *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1231 (10<sup>th</sup> Cir. 1999).) When faced with a  
10 statutory interpretation that "would raise serious constitutional problems, the [courts] will  
11 construe the statute to avoid such problems unless such construction is plainly contrary to  
12 the intent of Congress." (*DeBartolo Corp.*, 485 U.S. at 575, 108 S.Ct. 1392.) Any action  
13 of the Commission preempting local authority over PROW use, regulation of cable modem  
14 service, or the regulation of facilities which provide cable modem service presents serious  
15 constitutional questions, and thus the Commission is owed no deference even if said  
16 regulations are reasonable. Rather, the rule of constitutional doubt is applied. (*U.S. West,*  
17 *Inc. v. FCC*, 182 F.3d at 1231.)

18 B. The Authority Of The Commission To Preempt State And Local Regulation  
19 Of Non-Cable Services, Whether Characterized As An Interstate Information  
20 Service Or A Telecommunications Service, Is Extremely Limited And Must  
21 Be Based Upon A Showing That The Absence Of Said Preemption Would  
22 Interfere, In A Concrete And Demonstrable Manner, With Clearly  
23 Articulated Federal Objectives.

24 Any final decision made by the Commission regarding its own power to preempt  
25

26 <sup>8</sup> In reviewing Commission action, a court can only consider grounds set forth by the  
27 Commission in its action and cannot create permissible bases for affirmates in the absence  
28 of the Commission's articulation thereof. (*National Cable Television Association, Inc. v.*  
*FCC*, 914 F.2d 285, (D.C. Cir. 1990); *North Western Indiana Tl. Cl. v. FCC*, 824 F.2d  
1205, 1210 (D.C. Cir. 1987), cert. denied, \_\_\_ U.S. \_\_\_, 110 S.Ct. 575, 107 L.Ed.2d 773  
(1990).)

1 local regulation is reviewable de novo by the United States Courts of Appeal. (28  
2 U.S.C.A. § 2342(1)). The Supreme Court has refused to accord any special weight to the  
3 Commission's determination that certain state regulations were preempted and has  
4 rejected, based upon an absence of compelling evidence, the Commission's contention that  
5 preemption was necessary to fulfill its statutory obligation. (*Louisiana Public Service*  
6 *Commission v. FCC*, 476 U.S. 355, 374-75, 106 S.Ct. 1890, 1902, 90 L.Ed.2d 369 (1986)).

7 As the Fifth Circuit has stated:

8 "It is well established that courts need not refer an issue to an agency when  
9 the issue is strictly a legal one, involving neither the Agency's particular  
10 expertise nor its fact-finding prowess; the standards to be applied in  
11 resolving the issue are within the conventional competence of the courts and  
12 the judgment of the technically expert body is not likely to be helpful in the  
13 application of these standards to the facts of the case." (*Columbia Gas*  
14 *Transmission Corp. v. Allied Chemical Corp.*, 652 F.2d 503, 519 n.15 (5<sup>th</sup>  
15 Cir. 1981).

16 The bulk of the Commission's organic authority is provided pursuant to Title II  
17 (Telecommunications), Title III (Broadcasting), and Title VI (Cable Television) of the  
18 Communications Act of 1934 (the "Communications Act"). In addition, the Commission  
19 has general regulatory jurisdiction over "all interstate and foreign communications by wire  
20 or radio . . . and . . . all persons engaged within the United States in such communication  
21 [except for communications in the Canal Zone]." (*Id* at § 152(a)). However, the  
22 Commission's general jurisdiction over interstate communication and persons engaged in  
23 such communications "is restricted to that reasonably ancillary to the effective  
24 performance of [its] various responsibilities" under Title II, III, and VI of the Act. (*United*  
25 *States v. Southwestern Cable Co.*, 39 U.S. 157, 178, 88 S.Ct. 1994, 2005, 20 L.Ed.2d 1001  
26 (1968); *see also*, *FCC v. Midwest Video Corp.*, 440 U.S. 689, 99 S.Ct. 1435, 59 L.Ed.2d  
27 692 (1979); *United States v. Midwest Video Corp.*, 406 U.S. 649, 92 S.Ct. 1860, 32  
28 L.Ed.2d 390 (1972)). Although the Commission's ancillary powers may or may not be  
expansive under the Act depending on the circumstances, those ancillary powers do not  
include the "untrampled freedom to regulate activities over which the statute fails to  
confer, or expressly denies, Commission authority." (*National Association of Regulatory*

1 *Utility Commissioners v. FCC*, 533 F.2d 601, 617 (D.C. Cir. 1976)).

2 Cable modem service has developed under the watchful regulatory eye of local  
3 government since its inception. At a minimum, such events occurred with the tacit  
4 knowledge and approval of the Commission.<sup>9</sup> Although the California Franchising  
5 Authorities do not dispute the notion that the Commission has authority to change its  
6 regulatory mind, it is incumbent upon the Commission in doing so to demonstrate that it  
7 has examined the relevant data and articulated a satisfactory explanation for its action  
8 based upon the merits. (*People of State of California v. FCC*, 905 F.2d 1217, 1230 (9<sup>th</sup>  
9 Cir. 1990). A Commission decision will be overturned if the Commission has “failed to  
10 consider an important aspect of the problem” or has “offered an explanation for its  
11 decision that runs counter to the evidence before the Agency.” (*Motor Vehicle*  
12 *Manufacturers Association v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29, 43, 103  
13 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983)). Even the traditional deference granted  
14 Commission actions does not allow speculation to form the basis for critical Commission  
15 action. (*People of State of California v. FCC*, *Id.* at 1235).<sup>10</sup>

16 Judicial review of Agency decisions is particularly critical when the Commission  
17 attempts to trample upon traditional domain of local government. Even when Congress  
18 preempts an entire field of regulation, “every state statute that had some indirect effect [on  
19 that field] . . . is not preempted.” (*Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308,  
20 108 S.Ct. 1145, 1155, 99 L.Ed.2d 316 (1988), Federal Energy Regulatory Commission has  
21 exclusive jurisdiction over rates and facilities of natural gas companies, but not every law  
22

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23 <sup>9</sup> The Commission itself has addressed the upgrade of cable systems to specifically  
24 provide cable modem service in the various “Social Contracts” by which it required cable  
25 operators to invest in system upgrades which permit the offering of broadband Internet  
26 access, in exchange for certain Title VI rate concessions. Thus, the Commission has  
27 acknowledged a linkage between Title VI regulation and local government’s interests in  
28 both expanding and regulating cable modem service. See *Development of Advanced*  
*Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, CC  
Docket No. 98-146, Report, 15 FCC Rcd 20913 (2000) (“Second Report”), 20953, n. 126.  
<sup>10</sup> Unlike “minimum rationality” review under the due process and equal protection  
clauses, “arbitrary and capricious” review of Commission actions pursuant to the APA  
does not permit a reviewing court to impute reasons to the Agency and uphold its actions if  
it has any conceivable rational basis. (*People of State of California v. FCC*, *Id.* at 1238).

1 that effects rates and facilities preempted). The ultimate question, which must be based  
2 upon evidence in the administrative record, is whether local government's regulatory  
3 impact upon the deployment of non-cable services is sufficient to force the conclusion that  
4 Congress must have intended to preempt, or provided the Commission with authority to  
5 preempt, the type of local regulations in question. (*Cable Television Association v.*  
6 *Finnerman*, 954 F.2d 91, 101 (2<sup>nd</sup> Cir. 1992)). The Commission may not utilize its general  
7 jurisdiction to fill a legislative gap where Congress has expressly created said gap or no  
8 gap is deemed to reasonably exist. (*American Civil Liberties Union v. FCC*, 823 F.2d  
9 1554, 1571 (D.C. Cir. 1987)). Where an area of regulation falls traditionally within the  
10 domain of local government, local authority is provided deference. (*People of State of*  
11 *California v. FCC*, *Id.* at 1239-1240).

12 Title I does not constitute an independent source of regulatory authority; rather, it  
13 confers on the Commission only such powers as is ancillary to the Commission's specific  
14 statutory responsibilities. (*United States v. Southwest Cable Co., Id.*, 392 U.S. 157, 178  
15 (1968)). Thus, the Commission must show a strong nexus between any asserted Title I  
16 authority and other independent grants of authority pursuant to the Communications Act.  
17 ("The system of dual regulation established by Congress cannot be evaded by the  
18 talismanic implication of the Commission's Title I authority." (*People of State of*  
19 *California v. FCC*, *Id.*, at 1240-41, n. 35.)

20 The Commission may only preempt local regulation of telecommunications carriers  
21 which involve both interstate and intrastate communications pursuant to what is referred to  
22 as the "impossibility" exception carved out of Section 2(b)(1) of the Communications Act  
23 in *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 106 S.Ct. 1890, 90  
24 L.Ed.2d 369 (1986). Thus, where it can be demonstrated that state regulations cannot  
25 feasibly co-exist with the Commission's validly adopted interstate regulations, state  
26 regulations may be preempted. However, the "impossibility" exception is a limited one.  
27 The Commission may not justify a preemption order merely by showing that some of the  
28 preempted state regulation would, if not preempted, frustrate Commission regulatory

goals. Rather, the Commission bears the burden of justifying its entire preemption order by demonstrating the order is narrowly crafted to preempt only those state regulations as would negate valid Commission regulatory goals. (*People of State of California v. FCC*, *Id.* at 1243.) As the D.C. Circuit has held, “a valid FCC preemption order must be limited to [state regulations] that would necessary thwart or impede” the Commission’s goals. (*National Assn. of Regulatory Utility Commissioners v. FCC*, 880 F.2d 422, 430 (D.C. Cir. 1989).) Thus, where state and local regulations are protected by Title II, Title VI, or otherwise within the Communications Act, the Commission possesses a heavy burden of demonstrating that its regulation of the interstate aspects of a particular service or series of services would “necessarily be frustrated by all possible forms of related state and local regulations.” (*People of the State of California v. FCC*, *Id.* at 1243-44.) An argument that the local regulation will negate federal purposes in “many” cases does not suffice to justify the preemption of all local regulation in an area. The “impossibility” exception to Section 2(b)(1) is a narrow one that may be invoked only when state and federal regulations cannot feasibly co-exist. (*People of the State of California v. FCC*, *Id.* at 1244.)

V. CABLE MODEM SERVICE HAS THRIVED PURSUANT TO THE EXISTING “STRUCTURED DUALISM” REGULATORY REGIME.

A. Local Regulation Of Cable Modem Service Has Not Retarded Its Deployment.

The Commission has expressed its concern, and thus at least implicitly requested comments, upon the issue “. . . if state and local regulations limit the Commission’s ability to achieve its national broadband policy goals . . . to promote the deployment of advanced telecommunications capability to all Americans in a reasonable and timely manner, . . .to promote the continued development of the internet and other interactive computer services and other interactive media . . . and to preserve the vibrant and competitive free that presently exists for the internet and other interactive computer services, unfettered by federal or state regulations.” (DR/NPR, ¶ 98.) One must recognize that cable modem service has developed over the past years in an atmosphere of tripartite federal-state-local

1 regulatory auspices. Not only has cable modem service developed during this regime, it  
2 has, based upon the Commission's own most recent evidence, thrived and flourished  
3 notwithstanding, or perhaps due to, the shared jurisdictional regulatory approach which has  
4 existed since the inception of this service.

5 In its recently issued *Third Report in the Matter of Inquiry Concerning the*  
6 *Deployment of Advanced Telecommunications Capability to All Americans in a*  
7 *Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment*  
8 Pursuant to Section 706 of the Telecommunications Act of 1996, FCC 02-33, CC Docket  
9 98-146, Third Report, released February 6, 2002 (the "*Third Report*"), the Commission  
10 sets forth the following conclusions:

- 11 • "Comparison with data on high speed subscribership included in the Second  
12 Report suggests that there has been appreciable growth in the deployment of  
13 high speed services to residential and small business consumers in the past  
14 18 months. Moreover, these figures reveal that high speed services are  
available in many parts of the country and suggest that certain factors -- such  
as population density and income -- continue to be highly correlated with the  
availability of high speed services at this time." (*Third Report*, p. 5.)
- 15 • "Subscribers to high speed services were reported in each of the 50 states,  
16 the District of Columbia, Puerto Rico, and the Virgin Islands and in 78% of  
all of the zip codes in the United States. Our data further indicates that 97%  
17 of the country's population lives in those zip codes where high speed  
subscribership was reported." (*Third Report*, p. 5.)<sup>11</sup>
- 18 • ". . . growth in subscribership for residents and small business is consistent  
19 with the high level of availability indicated by the Commission's data.  
Results of the Commission's data collection show that there were a total of  
20 approximately 7.8 million high speed residential subscribers, as of June 30,  
2001. We estimate that approximately 4.3 million of these residential  
21 subscribers subscribe to services that meet the Commission's definition of  
advance services. By comparison, we stated in the Second Report that there  
22 were approximately 1.8 million high speed residential subscribers at the end  
of 1999. We estimated that approximately 1.0 million of these residential  
23 subscribers subscribed to services that meet the Commission's definition of  
advanced services. As a result, penetration of advanced services quadrupled  
24 from 1.0% of households at the end of 1999 to 3.8% at the end of June 2001.  
Looking more broadly at all high speed services (i.e., not only advanced  
services), the residential penetration rate was 7.0% at the end of June 2001."

25 <sup>11</sup> Based upon the reporting methodology utilized by the Commission in its Third Report,  
26 the Commission did not require providers to report the number or type of high speed  
27 services subscribers in each zip code but only to identify zip codes in which they had at  
least one high speed service subscriber. Thus, Commission data does not indicate the full  
28 extent to which the presence or lack thereof, of high speed services are available in any  
geographic area. (*Third Report*, ¶ 25, p.14.)

(Footnote omitted.) (*Third Report*, ¶ 30, p.16.)

- “At the end of June 2001, of the 7.8 million residential customers who subscribed to high speed services, approximately 5.0 million subscriber services using hybrid fiber-coaxial (HFC) technology, such as cable modem service, approximately 2.5 million subscribe to ADSL services, while the balance subscribe to other media, including satellite and fixed wireless services.” (*Third Report*, fn. 69, p. 16.)
- “Of the 4.3 million residential and small business subscribers to advanced services [at the end of 1999], there were approximately 3.1 million residential customers subscribed to cable-based services and approximately 0.9 million residential customers subscribed to ADSL, with the balance subscribing to other media. These figures show cable companies increasing their residential advanced services subscribership by 261% in 18 months and local exchange carriers increasing their residential DSL subscription to advanced services by 683%.” (*Third Report*, fn. 70, p. 16.)
- “Combining our data with publicly-available sources about the availability of cable modem plan, the 5.2 million cable high speed lines reported represents a penetration rate of approximately 8% of cable modem capable homes as of mid-year 2001. By contrast, in the Second Report, we reported a cable modem penetration rate of approximately 3% as of the beginning of 2000.” (Footnotes omitted.) (*Third Report*, ¶ 45, p. 21.)
- “. . . about 75% of households will have high speed internet access available from either DSL or cable modem service by the end of 2001, up from 60% in 2000. Another analyst estimates as of the first quarter of 2000, that 81% of households had available DSL or cable modem service. The analyst further estimates that 94% of households will have available DSL or cable modem service by 2005.” (Footnote omitted.) (*Third Report*, ¶ 61, p. 26.)
- “. . . investment in infrastructures to support high speed and advanced services has increased dramatically since 1996.” (*Third Report*, ¶ 62, p. 27.)
- “Recent investment in cable infrastructure has been significant. In 2000, the cable industry spent a total of \$15.5 billion on the construction of new plants, upgrades, rebuilds, new equipment, and the maintenance of new and existing equipment. This represents a 45.9% increase over the \$10.6 billion spent in 1999. Analysts expect that operators will have spent an estimated \$14.7 billion in 2001. Moreover, it appears that the amount invested in cable infrastructure has remained at high levels over the past several years and has resulted in increased availability of cable modem service. As of year end 2000, cable modem service was available to 58.5 million homes, as compared to 35.5 million in 1999. In 2001, cable modem services are estimated to be available to 77.5 million homes. Recent progress in network upgrades has allowed cable operators to provide two-way service to the vast majority of cable modem ready homes. One analyst predicts that by 2003 investment spending is expected to result in the upgrade of substantially all of the U.S. cable infrastructure (more than 99.9 million homes) to enable the delivery of new bandwidth-intensive services.” (Emphasis added.) (Footnotes omitted.) (*Third Report*, ¶ 65, pp. 28-29.)
- “Subscribership to cable modem service is also increasing. At the end of 2000 there were approximately 3.9 million cable subscribers. By year end 2001, an industry analyst estimates that cable modem subscriptions will

1 almost double to 7.5 million subscribers. In addition, that same analyst  
2 expects that over the next five years, cable modem subscriptions will  
3 continue to increase dramatically, reaching an average estimate of 28-30  
million by 2006 and forecasts penetration rates for cable modems to increase  
to 40% by 2006.” (Footnotes omitted.) (*Third Report*, ¶ 66, p. 29.)

- 4 • “Based upon our analysis, we conclude that the deployment of advanced  
5 telecommunications ability to all Americans is reasonable and timely. We  
6 find that there is continued and rapid growth in subscription to high-speed  
services on a nationwide basis, which is indicative of the increased  
availability of advanced services.” (*Third Report*, ¶ 89, p. 38.)<sup>12</sup>

7 Even as we speak, cable modem subscribership is increasing and continues to widen  
8 its lead over DSL services. Reports recently released by major cable operators demon-  
9 strated that AT&T, TWC, Comcast, Cox , and Charter collectively added 767,000 cable  
10 modem subscribers in the first quarter of 2002 as compared to 729,000 in the first quarter  
11 of 2001 and 738,000 in the fourth quarter of 2001. Cable modem subscribership was up  
12 5% for the major MSO’s on a year-to-year basis and for 4% quarter-to-quarter according to  
13 numbers surveyed by Multichannel News. (Multichannel News, Online Edition, “Cable  
14 Appears to Widen Data Lead”, May 6, 2002.) On May 13, 2002, Multichannel News  
15 reported that “. . . year over year growth for cable modem services up 12%, while DSL has  
16 experienced a 3% decline.” (Multichannel News, Online Edition, “Bilotti to Cable: Ignore  
17 Streets Pressure”, May 13, 2002.)

18 Real world empirical data constitutes a reasonable and relevant measure of the  
19 success or failure of a regulatory regime. (“. . . a regulatory scheme that can boast a  
20 competitive capital spending over a four year is not easily described as an unreasonable  
21 way to promote competitive investment in facilities.” (*Verizon Communications v.*  
22 *Federal Communication Commission*, 535 U.S. \_\_\_\_ (2002), slip opinion, p. 46)).

23 B. Local Regulation Of Cable Modem Service Has Accelerated Its Deployment.

24 Cable systems were upgraded pursuant to franchise requirements to a level capable  
25 of providing cable modem service in Berkeley, Glendale, Indian Wells, La Quinta, Moreno  
26 Valley, and a small portion of the County of Santa Cruz. But for those franchise-imposed  
27

28 <sup>12</sup> The Commission’s Press Release issued February 7, 2001 summarized the statistical  
results of the Third Report.



1 requirements, those communities would, in all likelihood, not enjoy the benefits of cable  
2 modem service today since the cable operators did not voluntarily agree to system  
3 upgrades. Likewise, in the City of Santa Cruz and the vast majority of the County of Santa  
4 Cruz, no cable modem service is available because of the lack of a franchise requirement  
5 and the unwillingness of the cable operator, in that case AT&T, to "belly up to the bar"  
6 and institute a voluntary rebuild. Although the economic incentive to upgrade cable plant  
7 to provide enhanced services, including but not limited to cable modem service, has  
8 certainly increased over the past several years given the technological availability of these  
9 services, their consumer acceptance, and the limited competitive options being provided by  
10 alternative providers such as direct broadcast satellite ("DBS"), the California Franchising  
11 Authorities believe that the absence of local regulation manifested through the inability of  
12 local government to mandate the deployment of cable modem service would have not only  
13 retarded its deployment over the past five years, but will, on a going forward basis,  
14 preclude many areas from ever receiving the advantages of cable modem service. Cable  
15 operators possess minimal incentive to upgrade plant, at least to the extent necessary to  
16 provide cable modem service, in low income areas, rural communities, inner cities, and  
17 other areas where the economics are not as attractive as they typically are in high-end  
18 densely populated suburbia. The Commission itself recognized the lack of sufficient  
19 market-induced incentives by providing the predecessors to TWC and Media One, Inc.,  
20 now a portion of AT&T, with a direct economic incentive to invest in upgrades and  
21 provide cable modem service by way of the Commission approved "Social Contracts"  
22 which traded plant upgrades and cable modem service deployment for Title VI rate relief.  
23 The combination of the regulatory efforts of local government and the Commission's own  
24 economic inducement programs, both pursuant to Title VI of the Communications Act,  
25 have done far more to accelerate the deployment of cable modem service than a free and  
26 unregulated market would have induced during the same timeframe.

1 VI. THE COMMISSION CANNOT AND SHOULD NOT PREEMPT OR  
2 FOREBEAR LOCAL FRANCHISING AND REGULATION OF FACILITIES  
3 LOCATED IN PROW WHICH PROVIDE NON-CABLE SERVICES.

4 A. Legal Authority To Regulate PROW, And Those Facilities Which Utilize  
5 PROW To Provide Any Form Of Communication Services, Is Grounded In  
6 State Constitution, Statute, And Policy And Does Not Arise From The  
7 Communications Act.

8 Local authority to franchise and regulate communication users of PROW does not  
9 emanate from Title VI or any other provisions of the Communications Act. As a general  
10 matter, with a few limited exceptions, neither Title II nor Title VI is a grant of authority to  
11 state or local government. Rather, long before Title II and Title VI of the Communications  
12 Act was enacted, states and local government possessed the right to franchise entities who  
13 sought to use and occupy PROW to provide both intrastate and interstate services. In most  
14 cases, the Communications Act constitutes a limitation upon local regulatory authority and  
15 not the grant thereof. Title VI, relating to cable television, imposes specific limits upon  
16 local authority but recognizes, in such provisions as section 617 relating to transfers as  
17 well as other salient provisions, that the foundation of local authority is state law which  
18 exists without any form of concomitant federal authorization. Thus, it is improper to  
19 conclude that localities need any form of federal authorization to require a franchise to use  
20 and occupy PROW to provide cable or non-cable services.

21 Likewise, localities do not need specific or general federal authority to charge fees  
22 for the use and occupancy of PROW to provide cable or non-cable services. Congress has  
23 created a delicate balance between the federal government and states and localities which  
24 is premised upon limited federal preemption of an area of law which confers broad  
25 authority on states or localities based upon use of PROW. This regime of "structural  
26 dualism" constitutes a carefully drafted legislative balance whereby important areas of  
27 traditional local concern, such as franchising and the receipt of compensation for PROW,  
28 was specifically intended by Congress to reside in the hands of state and local government.

1 In reality, it was the Commission's whose authority was limited, contoured, and defined by  
2 the Communications Act in these areas as opposed to the authority of state and local  
3 government. The Commission cannot, pursuant to its purported ancillary powers, alter the  
4 balance that Congress intended when it adopted Titles II and VI of the Communications  
5 Act. In the absence of Title VI of the Communications Act, local government could still  
6 franchise cable systems utilizing PROW, collect franchise fees or other forms of rent for  
7 the use of PROW, specify certain operational and construction standards, impose customer  
8 service safeguards, and ultimately regulate cable operators in much the same way the state  
9 and local governments have been regulating other uses of PROW such as electric utilities,  
10 gas utilities, pipeline utilities, and other uses of PROW for well over 150 years.

11 Thus, the vacuum of authority as to a particular use of the PROW, such as the  
12 provision of interstate information services, does not require or even justify the conclusion  
13 that Congress implicitly preempted local control in this area or intended to provide the  
14 Commission the authority to do indirectly what Congress did not do directly. Such is true  
15 whether or not the services provided by a Title VI regulated cable system or otherwise.  
16 There are numerous provisions of Title VI which contemplate the local regulation of the  
17 provision of non-cable services by cable operators using coterminous cable plant and the  
18 local regulation thereof. (*See, e.g.*, § 541(d)(1) (state may require information tariff for  
19 intrastate communication services other than cable services); § 543(a) (limiting state  
20 regulation of cable service prices, but not state regulation of non-cable service prices);  
21 § 544(b)(2) (franchising authority may enforce requirements for broad categories video  
22 programming or other services contained in a franchise); § 544(b)(1) (facilities  
23 requirements made as to both cable services and other services may be enforced);  
24 § 546(c)(1)(B) (renewal may be denied if the quality of the cable operator service, but  
25 without regard to the mix of quality of cable service or other services provided over the  
26 system, has been reasonable); § 551 (applying privacy provisions to any service provided  
27 by a cable operator, and providing that nothing in the cable act prevents the locality from  
28 enacting consistent laws for the protection of subscriber privacy); § 554 (city may enforce

1 EEOC requirements irrespective of nature of service); § 552 (locality may establish  
2 customer service and build out schedules of the cable operator; customer protection laws  
3 are protected unless “specifically preempted”).)

4       The fact that Congress intended to allow local government to exercise regulatory  
5 authority, and collect fees, upon all types of communication services utilizing PROW is  
6 made clear in the legislative history of the Telecommunications Act of 1996 (P.L. No. 104-  
7 104) (“TCA”). For example, the House Report demonstrates that Congress intended local  
8 government to possess the inherent flexibility to increase fees over some form of services  
9 to offset fees that might be eliminated or reduced based upon the non-discriminatory fee  
10 requirements imposed by Section 253(c). (*House Report No. 104-204*, July 24, 1995, p. 70  
11 (hereinafter “*House Report*”). 4 U.S. Code Cong. and Admin. News, 104<sup>th</sup> Congress 2<sup>nd</sup>  
12 Session, 1996, pps. 35-36). Congress expressly manifested its intent that local authority to  
13 impose PROW fees be maintained, which authority obviously cannot be circumvented by  
14 Commission preemption pursuant to its purported “implied authority.” (“... this Section  
15 does not otherwise limit the right of local governments to impose fees and other charges  
16 pursuant to Section 201(c)(3)(D), or limit the rights of local government with respect to  
17 franchise obligations applying to cable service.”) (*House Report*, Id. at 94, U.S. Code  
18 Cong. and Admin. News 60.) Given the fact that Congress concluded that local  
19 government should retain its implicit authority to impose PROW fees in relation to cable  
20 services and telecommunications services, it is impossible to conclude that the Congress  
21 could have intended that the Commission could provide “interstate information services” a  
22 free ride, especially when provided upon facilities which provide a bundling of cable  
23 services, telecommunications services, and information services. Even when  
24 telecommunications services are provided upon the same facility (i.e., cable system) as are  
25 cable services, Congress considered the issue and resolved it in favor of local imposition of  
26 fees upon the combination of services. (“... telecommunications services provided by a  
27 cable company shall be subject to the authority of a local government to manage its public  
28 rights-of-way in a non-discriminatory and competitively-neutral manner and to charge fair

1 and reasonable fees for its use.” (*House Report*, Id. at 179-80, 4 U.S. Code Cong. and  
2 Admin. News 193).)

3 Federal authority to preempt local regulation of PROW users is limited by the  
4 express and implied provisions of the Communications Act. (*See Communications Act of*  
5 1934 (“Communications Act”) 47 U.S.C. § 152(b), TCA § 601(c).) Adjunct to its clear  
6 Title VI authority to regulate cable services, Congress has specifically envisioned local  
7 enforcement of franchise requirements relating to the provision of both cable services and  
8 “other services” which presumptively include not only information services but any other  
9 type of communication service pursuant to franchise requirements. (§ 544(b).)

10 B. State Laws of Nuisance Prohibits Unauthorized Uses of PROW.

11 The rule is well settled that no person can acquire the right to make a special or  
12 exceptional use of PROW, not common to all citizens of the State, except by grant from  
13 the sovereign power. (*Municipal Corporations, McQuillin*, § 34.10.) Franchises, licenses,  
14 permits, or some other form of authorization must be obtained prior to utilization of  
15 PROW and other public property for purposes other than travel or the enjoyment of  
16 benefits common to all citizens. (*Municipal Corporations, McQuillin, supra*, at § 34.10;  
17 *Schoenfeld v. Seattle*, 265 F. 726 (1920).) If any entity, including a public service  
18 company, is not granted the right to utilize the streets of a municipality by a federal statute,  
19 the state constitution, a state statute, or by its own charter, it has no right to utilize such  
20 streets unless the host governmental entity consents to that use. (*Municipal Corporations,*  
21 *McQuillin, supra*, at §34.10.10; *Potter v. Calumet Elec. St. R. Co.*, 158 F. 521 (1908).)

22 A cable operator in California can potentially look to three sources for authorization  
23 to utilize PROW for the provision of commercial non-cable services such as cable modem  
24 service. Those sources of authority are as follows:

- 25 (1) Cable television franchise agreement;
- 26 (2) Cal. Public Utilities Code Section 7901 which authorizes “Telephone  
27 Corporations” to utilize PROW for the installation of “Telephone Lines”; and
- 28 (3) Section 253(a) of the Telecommunications Act of 1996 (the “TCA”)

1 which bars state and local government from taking any action which directly or  
2 indirectly "prohibits" the provision of a Telecommunication Service.

3 Assuming that cable modem service is not cable service, none of these sources  
4 provides authority to the cable operator to utilize PROW for the provision of cable modem  
5 service.

6 A cable franchise authorizes a cable operator to occupy PROW for the purpose of  
7 installing a cable television system for the provision of "cable service." Most broadband  
8 systems were constructed pursuant to the authority conferred by this document. Given the  
9 fact that a cable operator's primary authorization to occupy PROW lies within the "four  
10 squares" of its cable franchise, it is important to understand the appropriate interpretation  
11 and authorization of that document.

12 California law specifically recognizes the authority of cities and counties to grant  
13 franchises for construction of public utilities and other matters. (See Cal. Government  
14 Code § 26001; Cal. Government Code § 39732; Cal. Government Code § 53066; Cal.  
15 Constitution, Article XII, § 8; *Southern Pacific Pipelines, Inc. v. City of Long Beach*, 204  
16 Cal. App. 3d 660, 666, 251 Cal. Rptr. 411 (1998).) As the California Supreme Court has  
17 stated:

18 "No principle of law is better settled than that corporate privileges, which are  
19 not ordinarily and necessarily an incident of the corporate franchise, can be  
20 held to prevail over public rights only when it plainly and explicitly appears  
that such privileges have been, in fact, granted." (*Simons Brick Co. v. City of  
Los Angeles*, 182 Cal. 230, 232 (1920).)

21 A California cable franchise, like all other franchises, must be "... strictly  
22 construed in favor of the public, and the agency to which the power is delegated." (*City of  
23 Salinas v. Pacific Telephone & Telegraph Co.*, 72 Cal. App. 2d 494, 498 (1946).) The  
24 doctrine of strict construction, as applied to California franchises, is "a proposition too  
25 well settled to call for discussion." (*Wichmann v. City of Placerville*, 147 Cal. 162, 164,  
26 81 P. 537 (1905).) "No argument of convenience nor even of necessity justifies an  
27 unauthorized obstruction on or unauthorized interference with the free use by the public of  
28 one of its highways, and all such arrangements are to be addressed to the law making